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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No.

NEWELL HAMMOND,

PETITIONER,

v.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, A.F.L.-C.I.O., UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL NO. 985, and WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner NEWELL HAMMOND respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 14, 1972.

Opinions Below

The bench opinion of the District Court granting Respondents' motions to dismiss is reproduced in Appendix C hereto, p. 24. The opinion of the Court of Appeals affirming the judgment of the District Court is reproduced in Appendix A hereto, p. 20.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1972. This Court has jurisdiction to review this judgment under 28 USC §1254(1).

Question Presented

Did the Respondents' violate the Petitioner's right to free exercise of religion and other rights guaranteed him under the First, Fifth, and Ninth Amendments to the Constitution by discharging him pursuant to the union shop clause contained in the Collective Bargaining Agreement when the Petitioner's religious convictions and the tenets of his church forbid him from paying dues and fees to the Union.

Constitutional Provisions and Statutes Involved

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, of property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

NATIONAL LABOR RELATIONS ACT, §7, 29 USC §157, 61 Stat. 140

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

NATIONAL LABOR RELATIONS ACT, §8(a)(3),
29 USC §158(a)(3),
61 Stat. 140-141, 65 Stat. 601, 73 Stat. 525

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

NATIONAL LABOR RELATIONS ACT, §14(b),
29 USC §164(b), 61 Stat. 151

SEC. 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employ-

ment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Statement Under Rule 33(2)(b)

Since this proceeding may draw into question the constitutionality of §§7 and 8(a)(3) of the National Labor Relations Act, an act of Congress affecting the public interest, as applied to the petitioner in the circumstances of this case, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 USC §2403 may be applicable.

Neither the District Court nor the Sixth Circuit Court of Appeals entered a certification to the Attorney General under the provisions of 28 USC §2403.

Statement of the Case

The petitioner brought this action in the United States District Court for the Western District of Michigan, Southern Division, on June 17, 1970. Jurisdiction of the District Court was invoked under 28 USC §1331(a) and 1343 and 42 USC §1988, the question presented arising under the Constitution and laws of the United States and the amount in controversy exceeding Ten Thousand Dollars.

The Complaint contains the following pertinent allegations which must be taken as true.

On July 20, 1967, the Respondents entered into a collective bargaining agreement, embracing wages, hours, and other terms and conditions of employment for employees of the Company (Appendix E, p. 29). Pursuant to the provisions of the National Labor Relations Act, as amended, and in particular, Section 8(a)(3) thereof, the collective bargaining agreement included a union shop clause, which conditioned employment with the Respondent Company on union membership and the payment of an initiation fee and union's dues. (Appendix E p. 29)

On July 20, 1967, the date of the signing of the Agreement, the Petitioner had been in the employ of the Company for approximately Eleven (11) years and was then employed in the production department. (Appendix E, p.)

The petitioner is a member of the Seventh Day Adventist Church. (Appendix E, p. 29) One of the major tenets of the Church is that a member cannot surrender his right to make decisions nor financially support any organization which may act contrary to his conscientious religious convictions. (Appendix E, p. 30). The Petitioner informed the Respondents that as a member of the Seventh Day Adventist Church, he entertained and practiced the sincere religious and conscientious conviction and belief that the payment of fees and dues to a labor union violated his freedom of choice to deal justly and impartially with all men, for use of which freedom he is accountable to God. Accordingly, he informed the Respondents that he could not join the Union as required by Section 3.2 and 3.4 of the collective bargaining agreement, but to show his good faith, he offered to and did make periodic contributions to the American Red Cross in amounts equal to the Union dues that would have otherwise been payable by him as a Union member. (Appendix E, p. 30)

Notwithstanding the Petitioner's religious convictions and his efforts to explain them to the Respondents, the Union demanded that the Company terminate his employment. (Appendix E, p. 31) The Petitioner was then discharged on or about August 28, 1967, for the sole and stated reason that he had refused to join or pay dues to the local union as provided in Section 3.4 of the collective bargaining agreement. (Appendix E, p. 31)

Following his discharge, the Petitioner made extended and continued effort to obtain new employment at a salary comparable with that being paid by the Respondent Company but to no avail. (Appendix E, p. 31)

The Complaint also alleges that applied with the sanction

of the National Labor Relations Act the collective bargaining agreement, in particular the union shop clause, as applied to the Petitioner, violates his rights of free exercise of religion by conditioning his right to work upon surrender of his right to practice his religious beliefs and violates other rights he has under the First, Fifth, and Ninth Amendments to the Constitution.

Both Respondents moved to dismiss the Complaint for failure to state a claim upon which relief may be granted. These motions were granted by the District Court, and a judgment was entered dismissing the Complaint.

The Court of Appeals affirmed this judgment.

Reasons for Granting the Writ

I. THIS CASE RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT, NAMELY WHETHER THE CONSTITUTION PROTECTS THE RIGHT OF AN INDIVIDUAL EMPLOYEE TO REFUSE TO PAY DUES OR FEES TO A LABOR UNION BASED UPON HIS RELIGIOUS BELIEF, CONSCIENCE, AND THE TEACHING OF HIS CHURCH.

This case represents the fifth time that this question has been raised in a United States Court of Appeals. It arose first in behalf of the Plymouth Brethren in *Otten* v. *Baltimore & O. R. Co.*, 205 F.2d 58, final judgment affirmed sub nom. *Otten* v. *Staten Island Rapid Transit Railway Co.*, 229 F.2d 919, (CA 2), cert. den. 351 U.S. 983 and *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (CA 9), cert. den. 351 U.S. 946. The same issues were raised in behalf of Seventh-day Adventists in *Gray* v. *Gulf, Mobile & Ohio Railroad Company*, 429 F.2d 1064 (CA 5), cert. den. 400 U.S. 1001, and *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (CA 1), cert. den. 404 U.S. 872.[1]

[1] Mr. Chief Justice Berger and Mr. Justice Douglas dissenting in both cases.

A related issue involving freedom of association based on conscientious objection to joining a union was raised in *Russell* v. *Catherwood*, 33 App. Div. 2d 592, 304 N.Y.S. 2d 415, cert. den. 399 U.S. 936.[2]

The court of Appeals for the Fifth Circuit in deciding the *Gray* case squarely held that *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, was dispositive of the issue involved in that case, 429 F.2d at 1068.

The Court of Appeals for the First Circuit in *Linscott* also implied that *Hanson* was determinative, saying: "*Hanson's* balancing, and thus its conclusion, should be the same in the case before us, since the government's interest, and the Plaintiff's burden (loss of a union-shop employer) are the same." 440 F.2d at 17. Following the *Gray* and *Linscott* decisions, the Court of Appeals for the Sixth Circuit below also holds that *Hanson* is controlling (Appendix A, p. 21).

The *Hanson* case involved a general allegation by nine employees of the Union Pacific Railroad Company that the union-shop provision of the Railway Labor Act was unconstitutional. Although the Supreme Court upheld the general validity of Section 2, Eleventh of the Railway Labor Act (the analogous provision of Section 8(a)(3) of the National Labor Relations Act), the court was careful to point out that the holding was a narrow one:

> "*Wide-ranged* (non-particularized) problems are tendered under the First Amendment." 351 U.S. at 236 (emphasis added)
>
> ". . . It is argued that compulsory membership will be used to impair freedom of expression. *But that problem is not presented by this record.*" 351 U.S. at 238 (emphasis added)
>
> ". . . If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessements is used

[2]See dissenting opinion of Mr. Chief Justice Berger with whom Mr. Justice Douglas joined.

as a cover for forcing ideological conformity *or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.* For we pass narrowly on No. 2, Eleventh of the Railway Labor Act." 351 U.S. at 238 (emphasis added)

"... The Court has put to one side situations not now before us for which the protection of the First Amendment was earnestly urged at the bar. I, too, leave them to one side." 351 U.S. at 242 (Frankfurter, J. concurring)

No particularized, concrete constitutional claim was presented in *Hanson* and the Court expressly refused to decide an issue which was not properly before it.

"The First Amendment questions not reached in *Hanson* again confronted the Court (and were avoided by a process of statutory interpretation) in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961) R. Smith, L. Merrifield and T. St. Antoine, *Labor Relations Law*, 1028 (1968).

In the case of *International Assn; of Machinists* v. *Street*, 367 U.S. 740 (1961) the court acknowledged the basis on which the *Hanson* decision was rendered:

"We held in *(Hanson)* that enactment of the provision #2, Eleventh authorizing union shop agreements between interstate railroads and unions of their employees was a valid exercise by Congress of its powers under the Commerce Clause and did not violate the First Amendment or the Due Process Clause of the Fifth Amendment. It is argued that our disposition of the First Amendment claims in *Hanson* disposes of Appellees' constitutional claim in this case adversely to their contentions. We disagree. As appears from its history, that case decided only that #2, Eleventh, in authorizing collective agreements conditioning employees' continued employment on payment of union dues, initiation fees and assessments, *did not on its*

face infringe upon protected rights of association." 367 U.S. at 746-747. (emphasis added)

Speaking further concerning the limited ruling in *Hanson*, the Court said:

"... it becomes obvious that this Court passed merely on the constitutional validity of §2, Eleventh of the Railway Labor Act *on its face, and not as applied to infringe the particularized constitutional rights of any individual.*" 367 U.S. 748.

"... we therefore reserved decision of the constitutional questions which the Appellees present in this case." 367 U.S. at 748.

"... Thus, all that was held in *Hanson* was that §2, Eleventh was constitutional in its *bare authorization* of union shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents. We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which 'all employees shall become members of the labor organization representing their craft or class.' *Clearly, we passed neither upon forced association in any other aspect* nor upon the issue of the use of exacted money for political causes which were opposed by the employees." 367 U.S. at 749[3]

Despite this Court's limited holding in *Hanson*, the Sixth Circuit below held that the decision disposed of the Petitioner's particularized First Amendment claim. This was error by the Court because, as shown above, *Hanson* did not invoke a particular First Amendment claim nor was the test that is historically invoked in particularized First Amendment cases even mentioned in the case.[4]

[3]In *Street*, the Court avoided the constitutional question presented by construing Section 2 of the Railway Labor Act to prohibit a union's use of dues for political purposes after protest by the individual.

[4]The stringent test found in *Sherbert v. Verner*, 374 U.S. 398, (1963) was specifically taken from a series of cases originating long before the *Hanson* decision. See specifically 374 U.S. at 403-409.

The Court did not require a showing that the governmental interest was "paramount"[5] or that any infringement on First Amendment Rights was "necessary".[6] And, just as significantly, the Court did not examine the alleged injury to the Plaintiffs or balance the governmental interest against the injury. Even a cursory examination of the *Hanson* decision reveals that the due process constitutional test was invoked, not the test which is invoked where a particularized Firest Amendment infringement is alleged.

The Petitioner respectfully submits that if Certiorai is denied in this case, it will overrule this Court's pronouncement:

> "if dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or *other action in contravention of the First Amendment*".

the decision in *Hanson*

> *"will not prejudice the decision in that case." Hanson,* 351 U.S. at 238

II. THE OPINION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS IN PRINCIPLE WITH THE DECISION OF THIS COURT IN *Sherbert* v. *Verner*, 374 U.S. 398, OTHER DECISIONS FOLLOWING THAT CASE, AND *Wisconsin* v. *Yoder*, U.S. , OPINION NO. 70-110

The question presented in this case is when may conduct dictated by a religious conviction be regulated by the State or Congress, or private persons, with the sanction of the State or Congress? The Petitioner submits that this question was authoritatively determined by this Court in *Sherbert* v. *Verner* not *Hanson*.

In *Sherbert*, a member of the Seventh Day Adventist Church was discharged because she would not work on Saturday, the

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[5] *Thomas v. Collins*, 323 U.S. 516, 530 (1944), and cases cited therein.

[6] *Schneider v. State*, 308 U.S. 147, 161, (1939); *Martin v. Struthers*, 319 U.S. 141, 144-149, (1943).

Sabbath Day of her faith. Sherbert filed a claim for unemployment compensation benefits under a state statute which provided that a claimant was ineligible for benefits if she had failed, without good cause, to accept available suitable work when offered her. The Court held that to disqualify Sherbert solely on the ground that she had refused Saturday work, when the acceptance of such work would have been contrary to her religious beliefs, was to impose an unconstitutional burden on the free exercise of her religion. In so holding, the Court announced a several-fold test for balancing the competing interests:

(A) Is there a burden imposed on the exercise of religion?

"If . . . the decision of the (court below) is to withstand Appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise . . ." 374 U.S. at 403.

(B) If there is such a burden, is the infringement justified by a compelling governmental interest?

"We must . . . consider whether some compelling (governmental interest . . . justifies the substantial infringement of Appellant's First Amendment right." 374 U.S. at 406.

1. Is the governmental interest substantial?

". . . only the gravest abuses, endangering paramount interests, give occasion for permissable limitation. . ." 374 U.S. at 405 (citation omitted)

2. Is this the sole method by which the government may attain its goal?

". . . it would plainly be incumbent upon the (government) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights." 374 U.S. at 407 (footnote omitted)

(C) Would an exemption for those with religious scruples *in fact* impair the governmental interest?

"The Appellees suggest no more than a *possibility* (that the government's interest would be impaired)." 374 U.S. at 407. (emphasis added)

The test announced in *Sherbert* has been restated and applied in several recent cases:

"But the burden rests upon the Government to demonstrate the compelling interest requiring the restriction of free expression and to show that the regulation serves that interest with the least restriction possible on the citizen's ability to communicate his political dissent." *Women Strike For Peace* v. *Hickel*, 420 F.2d 597, at 605, (D.C. Cir. 1969)

"... Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. (A showing of a compelling governmental interest and) an equally convincing showing that 'no alternative forms of regulation would combat such abuses without infringing First Amendment Rights'." *Barnett* v. *Rodgers*, 410 F.2d 995, at 1000, (D.C. Cir. 1969)

"The Court in *Sherbert* thus utilized a two-fold analysis which calls for a determination of, first, whether the application of the statute imposes any burden on religion, and second, if it does, whether some compelling state interest justifies the infringement." *People* v. *Woody*, 61 Cal. 2d 716, 719, 40 Cal. Rptr. 69 (1964)

"... even if a compelling state interest were shown, the burden remains on the state (to show no alternative is available)." *Heilberg* v. *Fixa*, 236 Fed. Supp. 405, 408. (N.D., Cal., S.D. 1964) Cf. *Kovach* v. *Maddux*, 238, F. Supp. 835, 844, (MD Tenn. 1965)

And in dicta this Court recently reaffirmed the validity of the *Sherbert* test:

"... as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn

certain applications clashing with imperatives of religion and conscience, when the burden of First Amendment values is not justifiable in terms of the Government's valid aims." (citing *Sherbert*) *Gillette v. U.S.*, 91 S.Ct. 828, 842, (1971)

This specific meaning of "compelling state interest" also becomes clear from other cases following *Sherbert*. In *In re Jenison*, 375 U.S. 14, this court vacated the judgment of the Supreme Court of Minnesota, upholding a contempt conviction of a woman who refused on religious grounds to serve as a juror, and directed the Supreme Court of Minnesota to consider the case further in the light of *Sherbert v. Verner*. Upon reconsideration, *In re Jenison*, 267 Minn. 136, the Minnesota court held that there was an inadequate showing that the state's interest in obtaining competent jurors required the court to override the claim of free exercise of religion. This case did not hold that there was no compelling state interest in obtaining service of jurors, but rather that there was no such interest in compelling 100% enforcement of such a requirement against a religious objector.

One of the most significant recent cases dealing with the compelling interest test is this Court's decision in *State v. Yoder*, U.S. (1972) just handed down in May of this year.[7] In this case the Supreme Court of Wisconsin upheld the right of Amish parents to remove teenage children from the public schools and held unconstitutional, as applied to members of the Amish religion who have graduated from the eighth grade, the provisions of the compulsory education law. The court did not hold that there was no compelling interest in requiring education for children between seven and sixteen years, but rather the interest in applying the requirement universally in the face of the free exercise claim was not substantial enough. The court says, 49 Wis. 2d at 438, 182 N.W.2d at 542: "A compelling interest is not just a general interest

[7]No. 70-110 (May 15, 1972).

in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation." The court goes on to hold on the authority of *Sherbert* v. *Verner* and *In re Jenison* that an exemption for the Amish would not defeat the purpose of compulsory education. In affirming the judgment of the Supreme Court of Wisconsin, and citing *Sherbert*, this Court held that there must be a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder* at 9.

Despite the fact that in this case it was strenuously pointed out to the District Court that the *Sherbert* tests applied, the Court nevertheless granted the Respondents' motions to dismiss. No proof was taken nor were affidavits introduced into evidence. The District Court's sole reasoning was stated to be that because citizens must pay governmental taxes, the Petitioner must pay the Union. (Appendix C, p. 25). The Sixth Circuit's sole reason was that *Hanson* controlled. Neither the District Court nor the Court of Appeals ever considered the application of the *Sherbert* tests. Indeed, a court can't apply the *Sherbert* tests on a motion to dismiss because unattested assertions won't satisfy the requirements of the case.[8] However, even assuming that the court could apply *Sherbert* on a motion to dismiss, in this case there was absolutely no showing that the burden on the Petitioner's religion was justified by some compelling Federal interest, that the burden was the sole method by which the government could attain its goal, and that an exception to the Petitioner because of his religious convictions would impair the governmental interest. On the other side of the coin, because the Court of Appeals below affirmed the District's Court's order granting the motions to

[8] *Sherbert* at 407.

dismiss for failure to state a claim upon which relief may be granted, it must be accepted as true, as set forth in the complaint, that a tenet of the Seventh Day Adventist Church prohibited the Petitioner from paying compulsory union dues and that he personally held a deep conviction to the tenet. Thus, like in *Sherbert* and in *Yoder*, the Court is dealing here with a "cardinal principle" of religious faith. The Petitioner was faced with the same unmistakable compulsion that the Court found objectionable in *Sherbert*. He was forced to choose between adhering to his religious belief or surrendering an eleven year employment relationship. As a dedicated member of the Seventh Day Adventist Church, he had no choice but to refuse to pay the union dues. The burden placed on Petitioner's exercise of religion by the enforcement of the union shop clause is unmistakably clear.

Furthermore, the burden inflicted in this case results in even more substantial harm than the harm inflicted in *Sherbert*. In *Sherbert*, the individual forfeited twenty-two weeks of Unemployment Compensation. In the instant case, the Petitioner has forfeited thousands of dollars and the injury is one of continuing duration. Even today, the Petitioner has been unable to obtain employment at a similar salary without sacrificing his religious convictions.

The Petitioner respectfully submits that there is an irreconcilable conflict between the opinion below and the decisions and teachings of this Court, and other courts, that an infringement upon a particularized First Amendment freedom requires a showing of a *paramount* governmental interest which is *necessary* with *no alternative* available. It is not enough to show that union shop is legitimate, *not paramount*, and is allowable, *not necessary*.

III. THE *SHERBERT* TESTS CAN NOT BE APPLIED ON A MOTION TO DISMISS.

The Sixth Circuit's opinion below does not state the reasons for its decision except to cite *Hanson* as controlling. As shown

previously, this was erroneous. Both the *Sherbert* and *Yoder* decisions require a *showing* that the infringment on religion is necessary to protect a paramount governmental interest. The unattested assertions by counsel that a religious exemption would create disruptions to interstate commerce, or have disruptive effects among other employees who pay their dues, is not sufficient. The courts are prohibited from taking judicial notice of these unattested facts as well as the validity of the free rider argument. The only proper areas for judicial notice are facts which are capable of certain verification as well as matters of common knowledge. McCormick, *Evidence*, §§324, 325 (1954). Wigmore, including these two classifications, adds an additional classification to the list of facts which may be judiciously noticed.

> "(1) matters which are actually so notorious to all that the production of evidence would be unnecessary; (2) matters which the judicial function supposes the judge to be acquainted with; (3) matters . . . capable of such instant and unquestionable demonstrations, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary." 9 Wigmore, *Evidence* §2571 (3rd ed. 1940).

The Petitioner respectfully submits that possible disruptions to interstate commerce, the free rider doctrine, disruptive effects among other employees who pay their dues, and the promotion of stable collective bargaining, are all subjects beyond the realm of judicial notice either under Wigmore or McCormick's views. However, Wigmore goes on to say that if a matter is taken as true without requiring a party to offer evidence on the question, the opposing party should not be prevented from disputing the matter by additional evidence. 9 Wigmore, *Evidence*, §2567 (3rd ed. 1940).

Adopting Wigmore's view, the United States Supreme Court has stated that the subject matter of judicial notice is disput-

able. *Ohio Bell Tel. v. Public Util. Comm'n.*, 301 U.S. 292, 57 L. Ed. 1093, 57 S.Ct. 724 (1937). The court states at 301 that:

> ". . . notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence."

The Petitioner respectfully submits that he was denied due process of law when the District Court took judicial notice of questionable facts and then denied him the right to a hearing in order to dispute those facts.

Conclusion

The question raised in this case is vital to the livelihoods of Americans belonging to a variety of religious sects, and in particular Seventh-day Adventists, who are taught that the payment of fees and dues to a labor union requires the surrender of the member's obligation to deal justly and equally with all men to which he is accountable to God. This is not the case where an individual employee is required by a union and company to abandon a personal secular belief but rather the employee is required to abandon a deeply held religious conviction and tenet of his church if he wishes to pursue his right to earn a livelihood.

In Michigan, as well as numerous other highly industrialized states, the union shop clause is common and prevalent. In fact, in Michigan union security provisions requiring the payment of union dues or agency fees is sanctioned by state law in both private industry and public employment. Accordingly, no longer does the Seventh-day Adventist have the mobility to seek employment in that sector of our economy which is excluded from the coverage of the National Labor Relations Act. In short, the time is here when a Seventh-day Adventist in Michigan must abandon his religious convictions and the tenet of the church if he wishes employment or move from

the state in a search to secure a livelihood in other localities of the country which do not sanction or allow union security provisions in every sector of the economy.

As stated in *Yoder*, it is not sufficient to say that the Petitioner may relocate in some more tolerant state or country for *"forced migration of religious minorities was an evil which lay at the heart of the religious clauses"*, *Yoder*, at p. 13, footnote 9.

For the foregoing reasons, this Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

LEE BOOTHBY
THOMAS H. SCHWARZE
Attorneys for Petitioner

Dated: September 6, 1972

APPENDIX A

United States Court of Appeals
For the Sixth Circuit

No. 71-1836

NEWELL HAMMOND,
Plaintiff-Appellant,

v.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO,
and
UNITED PAPERMAKERS AND PAPERWORKERS LOCAL No. 985,
and
WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed June 14, 1972.

Before: EDWARDS, PECK and MCCREE, Circuit Judges.

PER CURIAM. Plaintiff-appellant Hammond appeals from a summary judgment entered in the United States District Court for the Western District of Michigan dismissing his complaint as a matter of law.

Hammond worked for the Watervliet Paper Company, which the Papermakers Union organized and from which it subsequently secured a union shop agreement. With all due notice and warning as to the provisions of the union shop agreement, Hammond declined to join the union because
2 *Hammond* v. *United Papermakers, etc., et al.* No. 71-1836
of his Seventh Day Adventist beliefs. He also declined (and does now) to pay the equivalent of the union dues, whether he joined the union or not, on the ground that it would represent "striving" in violation of his religious faith to support in any way any organization like the union.

He was thereupon discharged and several years later filed a suit for damages for his claimed wrongful discharge against both the union and the company.

It is clear, of course, that Congress has authorized union shop clauses (such as that under consideration here) as permissible, contractual provisions in a collective bargaining agreement between a union and a management. *See* 29 U.S.C. §158(a)(3) (1970), §8(a)(3) of the National Labor Relations Act. Such legislation has been upheld by the United States Supreme Court in *Railway Employees Department* v. *Hanson*, 351 U.S. 225 (1956).

Since appellant's discharge occurred before the enactment of the Equal Employment Opportunity Act, 42 U.S.C. §2000e, *et seq.*, (1970), his reliance must be upon the terms of the First Amendment. In this regard the basic holding of *Hanson* becomes significant:

> We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. *Railway Employees Department* v. *Hanson, supra* at 238.

The specific issue involved here pertaining to discharge of a Seventh Day Adventist for failure to join or pay the equiva-

lent of dues to a union has been decided adversely to appellant by the First Circuit in *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), and by the Fifth Circuit in *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

No. 71-1886 *Hammond* v. *United Papermakers, etc., et al.* 3

The District Judge who granted summary judgment gave sympathetic attention to appellant's complaint, but obviously felt constrained by decided law to rule against him.

For the reasons set forth above and further stated in the District Judge's opinion from the bench, we affirm the judgment of the District Court.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 71-1886

NEWELL HAMMOND,
PLAINTIFF-APPELLANT,
VS.
UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO, AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985, AND WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,
Defendants-Appellees.

Before: EDWARDS, PECK and MCCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

James A. Higgins, *Clerk*

A True Copy.

Attest:

Clerk

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

NEWELL HAMMOND,

PLAINTIFF,

VS.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985 AND WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

Civil Action No. 246

DEFENDENTS.

BENCH OPINION

THE COURT: The Court has carefully considered this case. All of the positions of the plaintiff factually are taken as true and proved.

The First Circuit Court in Linscott versus Millers Falls case does apply with particularity and deliberate consideration with the Sherbert test to the facts that were taken as true in the Linscott case when it went before the Circuit Court on defendants' motion to dismiss. Thrust is that the ultimate objective of a congressionally approved union security is to provide a means of support of an industry participating in interstate commerce, maintains a representation of all the employees in the certified plant. Certified namely by the bargaining agent

for the plant, it would tax the cost of maintaining that agency hopefully distributed among all of those who were participants in the benefits.

The tax is to be paid to the agent for the agent's benefit and to no one else. One cannot avoid income tax, state, local or national by agreeing to pay the same to a charitable organization of either the government's choice or of its own choice. Taxes do not work that way. These are not the ways of Caesar. Taxes are supposed to apply to all who share the benefits of the government agency that the taxes support.

The same principle has been approved as a neams of support for certified bargaining agents in the collective bargaining scheme of management labor relations which is developing its own type of common law as well.

The Linscott versus Millers Falls, those in the district and in the first circuit are controls of this case. They are supported by the Gray case, Gray versus Gulf, Mobile and Ohio Railroad as well as Hanson and Sweet. Dewey is also a supporting case.

This issue has been well and fairly litigated in other jurisdictions and the progress has been clear and certain to the ultimate judgments which have been enumerated by the Court.

For the reasons stated, defendants United Papermakers and Paperworkers Union, AFL-CIO and United Papermakers and Paperworkers Local No. 985 and Watervliet Paper Company, Division of Hammermill Paper Company motions to dismiss are hereby granted.

And an order may be entered accordingly, and I must confess my sincere sympathy and empathy with the plaintiff's position.

MR. SCHWARZE: Your Honor, may I ask a point of clarification for the record? The motion to dismiss; and there were numerous motions to dismiss—lack of special matter, jurisdiction, and various data claimed upon which relief can be granted. Are you distinguishing motions for which relief can be granted?

THE COURT: I think I have stated what I have stated in my opinion.

And I reserve the right of reviewing this opinion so that it does state precisely what I intended it to state and modify it in the form I was thinking.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

NEWELL HAMMOND,

PLAINTIFF,

VS.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985 AND WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

DEFENDANTS.

Order Dismissing
File No. 246

At a session of said Court held on the 30th day of June, 1971, in the City of Kalamazoo, County of Kalamazoo, State of Michigan.

PRESENT: Honorable Noel P. Fox

This cause having been brought on to be heard upon the Motion to Dismiss complaint of the plaintiff and it appearing to this court that the pleadings of plaintiff, if taken as true, fail to state a cause of action upon which relief can be granted;

NOW, THEREFORE, IT IS ORDERED that the complaint of plaintiff may be and is hereby dismissed.

NOEL P. FOX

APPROVED AS TO FORM:

LEE BOOTHBY,
Attorney for Plaintiff

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEWELL HAMMOND,

PLAINTIFF,

VS.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, A.F.L.-C.I.O. AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985 AND WATERVLIET PAPER COMPANY DIVISION OF HAMMERMILL PAPER COMPANY

Civil Action No. 246

COMPLAINT

THE PLAINTIFF SAYS:

1. This Court has jurisdiction over this action by virtue of the provisions of Title 28, United States Code, Sections 1331(a) and 1343, and Title 42, United States Code, Section 1988. The questions presented herein arise under the Constitution and laws of the United States, and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

2. Plaintiff is a resident of Watervliet, Berrien County, Michigan. Defendants United Papermakers and Paperworkers Union, A.F.L.-C.I.O. and its affiliated Local No. 985 (hereinafter referred to as the Union) are labor organizations having offices in Berrien County, Michigan. Defendant Watervliet Paper Company, a division of Hammermill Paper Company, is a foreign corporation having offices and doing business in Berrien County, Michigan.

3. On July 20, 1967, plaintiff was in the employment of the defendant paper company as a production employee at a

salary of approximately $8,000.00 per year. He had been an employee of said company for approximately 11 years.

4. On July 20, 1967, pursuant to the provisions of the National Labor Relations Act, as amended, and in particular of Section 8(a)(3) thereof, the defendant Watervliet Paper Company entered into a collective bargaining agreement with the defendant United Papermakers & Paperworkers, A.F.L.-C.I.O., and its affiliated Local No. 985. Pertinent portions of said agreement provide:

> "Section 3.2—Employees Included
> "The bargaining unit represented by the Union includes all production and maintenance employees in the Watervliet Paper Company, Division of Hammermill Paper Company, at its Watervliet, Michigan plant."

> "Section 3.4—Union Membership
> "It shall be a condition of employment that all employees of the employer covered by this Agreement who are members of the Union on the effective date of this Agreement or the date of the signing of this Agreement, whichever is later, shall remain members of this Union, and those who are not members on the effective date of this Agreement or the signing of this Agreement, whichever is later, shall on or after the Thirtieth (30th) day following the effective day of this Agreement or the date of signing of this Agreement, whichever is later, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees hired after the signing of this Agreement, shall after forty-five (45) days following the beginning of such employment, or the expiration of their probationary period as provided in Article 12, Section 12.2 paragraph (a), become and remain members in good standing in the Union."

5. The Plaintiff was not a member of any Union at the time of the execution of the collective bargaining agreement

by the Defendants and thereafter failed and refused to become a member of the Defendant Union or pay membership fees and dues as a matter of conscience, religious training, belief, and as a member of the Seventh-day Adventist Church; and has at all times here pertinent entertained and practiced the sincere religious and conscientious conviction and belief that membership in and payment of fees and dues to a labor union violated his freedom of choice to deal justly and impartially with all men, for use of which freedom he is accountable to God.

6. Seventh-day Adventists believe in proper wages, proper hours, and proper working conditions. They also believe that they must not strive in their dealing with their fellowmen and that they must not be "unequally yoked" with those of different beliefs, objectives, and principles, that they must not discriminate between employer and employee, that they must witness to both, and to all classes of people, and to the degree to which a Seventh-day Adventist allies himself with one class against another, to that degree he violates his obligation to God to bear witness of the love of God and salvation of all men.

Seventh-day Adventists cherish as God's gift the principle of liberty of conscience as set forth in the Holy Scriptures and recognized and acknowledged as inalienable by the Government of the United States both in the Declaration of Independence and in its Constitution. It is on the basis of these principles that the Plaintiff cannot surrender his right to make decisions and financially support any organization which may act contrary to his conscientious religious convictions.

7. After the signing of the collective bargaining agreement, plaintiff signified to defendants his unwillingness to profit unjustly from any improvements in working conditions that might result from the collective bargaining agreement; he offered to, and did, make periodic contributions to the American Red Cross in amounts equal to the union dues that would have otherwise been payable by him as a union member.

8. On or about August 28, 1967, under the compulsion of

the collective bargaining agreement and the demands of the defendant unions, the employer company terminated plaintiff's employee-employer relationship by discharging him for the sole and stated reason that he had refused to join or pay dues to the local union as provided in Section 3.4 of the collective bargaining agreement.

9. Since his discharge on August 28, 1967, plaintiff has made extended and continued effort to obtain new employment at a salary comparable with that being paid him by the defendant paper company at the time of his discharge. The largest salary he has been able to obtain is approximately $6,000.00 per year.

10. Applied with the sanction of the National Labor Relations Act and therefore having the force of law, the collective bargaining agreement here in question, as applied to plaintiff, violates:

(a) Plaintiff's rights under the First Amendment by penalizing the free exercise of his religious belief and by conditioning his right to work upon surrender of his right to practice his religious beliefs.

(b) Plaintiff's rights not to be deprived of his contract or employer-employee relationship with his employer, arising under the Fifth Amendment.

(c) Plaintiff's rights under the Ninth Amendment to have his employer-employee relationship remain without interference under the collective bargaining agreement for union shop.

(d) Plaintiff's right under the Fourteenth Amendment.

11. As a direct result of the wrongful acts of defendants, plaintiff has already suffered loss of salary and benefits that exceeds $10,000.00, and unless defendants be enjoined from continuing to enforce the union shop provision of the collective bargaining agreement against him, plaintiff will continue to suffer further loss of salary and benefits each day the defendants

continue to enforce that provision by preventing his resumption of his former position with the defendant paper company.

12. Defendants' conduct threatens irreparable injury because the full amount of damage flowing from their wrongful conduct is difficult if not impossible of ascertainment.

13. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands:

(1) Judgment against the defendants, jointly and severally, for damages in the amount of $100,000.00.

(2) That the defendants and each of them be enjoined from doing any act to enforce against plaintiff the provisions of Section 3.4 of the collective bargaining agreement, and by mandatory injunction be required to reinstate plaintiff in his position with the defendant paper company at a salary not less than that being paid to him at the time of the discharge, and with all perquisites and privileges of his previous employment, including supplementary benefits, and those salary increases and benefits which, but for defendants' wrongful conduct, would have accrued to plaintiff in such employment.

(3) That an order be entered taxing defendants with the costs herein.

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